Supreme Court, U.S.
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No. 09-1384

In The Supreme Court of the United States

CONNIE BURNS WATKINS, RICHARD WATKINS,

Petitioners,

v.

CITY OF PARAGOULD, ARKANSAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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June 9, 2010

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Eighth Circuit Court of Appeals dismissed, for lack of jurisdiction, the petitioners' appeal of a judgment of the U.S. District Court for the Eastern District of Arkansas, striking the petitioner's fifth amended counterclaim and cross-complaint for failure to comply with Rule 14 of the Arkansas Rules of Civil Procedure and Rule 14 of the Federal Rules of Civil Procedure and remanding the case to the Circuit Court of Greene County, Arkansas, Civil Division. The petition here presents no federal question for review by certiorari pursuant to this Court's Rule 10. The order remanding the case to the Circuit Court of Greene County, Arkansas, is not appealable pursuant to 28 USC §1447.

PARTIES TO PROCEEDING

The statement of the parties to the proceedings on pages iv through v of the petition contains the names of all parties remaining in the case.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

The original complaint giving rise to this case was filed in the Circuit Court Civil Division of Greene County, Arkansas by the City of Paragould, Arkansas, acting by and through its Paragould Light and Water Commission (an arm of the city created by ordinance to operate the city's utility system). For many years prior to 2006, the Commission had conflicts and confrontations with the petitioners, Connie Burns Watkins and Richard Watkins, her husband, concerning trimming of trees and brush along and adjoining rights-of-way for electrical distribution lines. A final confrontation on November 27, 2006, resulted in the arrest of the petitioner, Connie Burns Watkins, for disorderly conduct, a misdemeanor. [A conviction in the Greene County District Court was appealed de novo to the Circuit Court of Greene County, Criminal Division, resulting in a second conviction which was subsequently appealed and confirmed by the Arkansas Court of Appeals. See *Connie Watkins v. State of Arkansas,* 2010 Ark. App. 85 (Ark. App. 1-27-2010)].

Suit was brought by Paragould Light and Water Commission against the Watkinses to restrain and enjoin them from interfering with, threatening, harassing or physically or verbally abusing the Commission, the Commission's employees or contractors in the maintenance of the right-of-way for

the electrical transmission lines. An answer and four subsequent amended counter-claims were filed by the Watkinses, ultimately resulting in 26 alleged causes of action against the city. On February 17, 2009, the Circuit Court of Greene County granted partial summary judgment on claims of alleged constitutional violations, unlawful arrest, malicious prosecution, excessive force, selective prosecution, defamation and other claims. The Court left surviving allegations of selective enforcement, breach of contract, outrage, trespass, harassment, property damage and excessive force. Trial was scheduled for October 19 through 21, 2009, on the remaining issues.

On September 18, 2009, the petitioners filed a fifth amended counter-claim (and cross-complaint, although they didn't call it that) consisting of approximately 300 pages and for the first time adding as cross-defendants, in their individual capacities, the mayor, chief of police, two captains of the police department, three police officers, the city building inspector and code enforcement officer, two city attorneys, one assistant city attorney and deputy prosecutor, the general manager and CEO of Paragould Light and Water Commission, seven employees of Paragould Light and Water Commission, Crafton Tree Service (a contractor for the Commission), two owners of the tree service and a surveyor.

No motion was filed nor was leave granted to the petitioners here as required by Rule 14 of Arkansas

Rules of Civil Procedure or Rule 14 of the Federal Rules of Civil Procedure (almost identical) to add the additional third party defendants. The Commission and its employees along with the surveyor filed a motion to dismiss the amended counter-claim and cross-complaint for failure to comply with Rule 14. Before further procedures could be taken, the remaining cross defendants removed the case to the U.S. District Court for the Eastern District of Arkansas, Jonesboro Division.

The District Court by order entered October 26, 2009, found that the petitioners here had failed to comply with Rule 14 under either the Arkansas Rules of Civil Procedure or the Federal Rules of Civil Procedure. It further found that if leave had been sought, the request would likely have been denied based on untimeliness, proximity to the trial date, previous court rulings and the fact that several of the new claims appeared to lack merit based on statute of limitations or barred by the *Rooker-Feldman* Doctrine.

The petitioners appealed to the Eighth Circuit Court of Appeals and by order entered December 14, 2009, the Court of Appeals dismissed for lack of jurisdiction. A petition for rehearing *en banc* was denied February 11, 2010.

II. REASONS FOR DENYING THE PETITION

A. AN ORDER REMANDING A CASE TO THE STATE COURT IS NOT REVIEWABLE ON APPEAL UNDER 28 USC §1447(D)

Basically, the U.S. District Court dismissed the petitioners' fifth amended counter-claim and cross-complaint because they failed to comply with the procedural rule requiring a motion by the petitioners and an order authorizing the service of summons on third parties not otherwise previously parties to the case. Rule 14(a) of Arkansas Rules of Civil Procedure, Rule 14(a)(1) Federal Rules of Civil Procedure.

Because the federal issues raised in the fifth amended counter-claim and cross-complaint were thus eliminated, no federal questions remained and the case was remanded to the Greene County Circuit Court. Such an order is not reviewable on appeal under 28 USC §1447(d): " . . . an order remanding a case to the State Court from which it is removed is not reviewable on appeal or otherwise. . . ."

The petitioners here attempt to avoid the application of Rule 14 by saying the Court should realign the parties according to the petitioners' theory of the case. Unfortunately, Rule 14 of both the Arkansas Rules of Civil Procedure and the Federal Rules of Civil Procedure specify not only that third parties can only be brought in after leave of the court, but also governs the alignment of the parties (i.e.: defendants/third party complainants and third party

defendants, etc.). It may be that without counsel, petitioners are unaware that both State and Federal Rules 14 govern the entire third party practice. Therefore, the petitioners attempt to get around the procedural problems and preserve an appeal by realigning of the parties must fail.

The District Court order and a Court of Appeals order are not further appealable.

B. THE DOCTRINES IN *WACO* AND *COHEN* ARE INAPPLICABLE TO THIS CASE

Petitioners urge that the District Court remand and Eighth Circuit affirmance were incorrect under the doctrine of the *City of Waco v. United States Fidelity and Guaranty Company,* 293 U.S. 140, 55 S.Ct. 6, 79 L. Ed. 244 (1934) and the collateral order doctrine of *Cohen v. The Beneficial Industrial Loan Corporation,* 337 U.S. 541, 69 S.Ct. 1221, 93 L. Ed. 1528 (1949).

Waco and its progeny held that where the decree of dismissal substantively preceded the order of remand, the appeal would lie because of adjudication on the substantive issue. In *Cohen* the District Court refused to order the plaintiff in a stockholder's derivative action to post the security for costs as required by a New Jersey statute. The defendant sought immediate review of the question whether the state statute applied to derivative suits in Federal Court. The Supreme Court noted that the purpose of the finality requirement " . . . is to combine in one

review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." Because immediate review of the District Court's order was consistent with that purpose, the court held it appealable as a "final decision" holding that the ruling had "settled conclusively the Corporation's claim that it was entitled by state law to require the shareholder to post security for costs . . . [and] concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment."

Here, the District Court ruled as a procedural matter that when the petitioners filed their third party complaint, they failed to comply with Rule 14 (both under the State Rules of Civil Procedure and the Federal Rules of Civil Procedure) by failing to obtain court approval of a filing of same and therefore the fifth amended counter-claim and cross-complaint should be stricken. No further federal issues remaining, the District Court remanded the case to the State Court for further proceedings. Nothing would prevent the petitioners from attempting to file further pleadings in State Court if they could properly follow the procedures to do so.

In *Powers v. Southland Corporation*, 4 F.3d 223 (3d Cir. 1993) the plaintiffs moved to amend their complaint in order to join an additional defendant whose presence would defeat diversity jurisdiction, after the state's statute of limitations had expired. The District Court granted the plaintiffs' motion and remanded the entire case to the State Court. The

Third Circuit Court of Appeals concluded that the underlying order permitting the plaintiffs to amend their complaint was not final because that order, though unreviewable in Federal Court, would be reviewable by the State Appellate Court on appeal and therefore the "unreviewability" prong of the collateral final order doctrine under *Cohen* was not satisfied. Essentially the same situation is presented here. Petitioners failed to follow the court procedures for filing the fifth amended counter-claim and cross-complaint. In doing so, they rendered the entire process of having filed the cross-complaint and the service of summons thereunder a nullity. Theoretically, petitioners could, if they could follow the procedural rules, revive their claim if it is not otherwise deficient for some reason. There is clearly no portion of a District Court action that has not been remanded and there is no party or cause of action (other than those terminated by previous State Court partial summary judgment orders – not appealed from) which have been prejudicially dismissed in the case.

In *Armstrong v. Alabama Power Company,* 667 F.2d 1385 (11th Cir. 1982) the Court of Appeals had before it, a case where a man and his wife were killed when the mast of their sail boat touched an overhead power line owned by the power company. Suit was brought against the power company. The power company filed a third-party complaint against the United States for its alleged failure to mark the power line on the applicable navigation chart. The third-party complaint was based on the Suits Admiralty Act, 46 USC §741, et seq. The Admiralty

Act provided an exception to the normal United States general sovereign immunity but provided that suits under the act are under the exclusive jurisdiction of the Federal District Court. For some reason, the United States, rather than to seek dismissal of the third-party complaint against it, removed the case to the Federal Court. The District Court ultimately decided that the State Court did not have jurisdiction over the United States and therefore dismissed it from the third-party complaint and then remanded the case to the State Court for further proceedings. In affirming the District Court action, the Court stated:

> We find that the District Court properly dismissed the United States. We reached this conclusion because the derivative nature of removal jurisdiction: the jurisdiction of a Federal Court over a removed case can be no greater than that of the State Court whence the case came; the State Court here had no jurisdiction over the United States because of the Suits Admiralty Act's exclusive federal jurisdiction; therefore, the Federal District Court received no jurisdiction over the United States on removal.

The reasoning in *Armstrong* is applicable here. The petitioners failed to follow Rule 14 by obtaining permission of the State Court to file the fifth amended counter-claim and cross-complaint. Any summonses or further proceedings under that cross-complaint were annulled for failure to obtain the court order approving the same. Therefore, no jurisdiction over

the third-party defendants was acquired. It was in that posture that the case was removed and the District Court found properly that for procedural reasons, the fifth amended counter-claim and cross-complaint should be stricken, which left no federal issues to be adjudicated and therefore remanded the same to State Court. The procedural nature of the actions taken by the District Court renders the order of remand non-appealable.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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